No. 84-703

In the Supreme Court of the United States

OCTOBER TERM, 1984

ALEX J. RAINERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

GLORIA C. PHARES
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals correctly declined to consider petitioner's claims of error raised in a motion filed under 28 U.S.C. 2255 upon concluding that some of those claims had been raised and rejected in petitioner's direct appeal from his conviction and that petitioner had waived the others by not raising them on direct appeal and failing to make the necessary showing of cause and prejudice to excuse the waiver.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Statutes—Continued:

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-703

ALEX J. RAINERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) affirming the denial of petitioner's motion under 28 U.S.C. 2255 is unreported. The opinion of the court of appeals affirming petitioner's conviction on direct appeal is reported at 670 F.2d 702.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1984. A petition for rehearing was denied on August 24, 1984 (Pet. App. C). The petition for a writ of certiorari was filed on November 2, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Wisconsin, petitioner was convicted on all counts of an indictment charging that he had

caused travel or the use of a facility in interstate commerce to promote a business enterprise involving illegal prostitution, in violation of 18 U.S.C. 1952 and 2 (Counts I through III); that he had knowingly made false and material declarations before a federal grand jury, in violation of 18 U.S.C. 1623 (Count IV); and that he had attempted to obstruct justice by arranging to have a prospective grand jury witness threatened in connection with her prospective testimony, in violation of 18 U.S.C. 1503 (Count V). Petitioner was sentenced to consecutive terms of imprisonment of one and two years on Counts IV and V, respectively. He also was fined $5,000 on each of Counts I through III.

1. The evidence showed that in 1976, at petitioner's request, Cira Gasbarri returned from California to Hurley, Wisconsin, to reopen the Showbar, which her husband had operated as a prostitution enterprise before his death in November 1975. From late 1976 until early 1979, petitioner managed the Showbar with Gasbarri. Petitioner paid Gasbarri $50 for every night she worked at the Showbar and, at his urging, she permitted prostitution in the Showbar. *United States* v. *Raineri*, 670 F.2d 702, 716 (7th Cir.), cert. denied, 459 U.S. 1035 (1982).

During the period that petitioner managed the Showbar, he also promoted prostitution there.[1] Dancers employed by the bar would go to booths in the bar and masturbate customers who had paid $35 or $50 for a $3 bottle of champagne.[2] During the same period, the dancer/prostitutes made arrangements in the bar for the sale of sexual

---

[1]According to the court of appeals, petitioner "virtually concede[d] the sufficiency of the evidence which demonstrated his intent to promote prostitution at the Showbar and his promotion of prostitution there." *United States* v. *Raineri*, 670 F.2d at 715.

[2]Wisconsin defines the offense of prostitution to include intentionally masturbating a person for any thing of value. Wis. Stat. Ann. § 944.30(4) (1982); *City of Madison* v. *Schultz*, 98 Wis. 2d 188, 197, 295

favors to the bar's customers. Prostitutes either put a share of their receipts into a box in the ladies' dressing room or gave it to the bartender. Above the bar were about 20 rooms with beds used for prostitution. The rooms were supplied with sheets, pillowcases, and electricity. *United States* v. *Raineri*, 670 F.2d at 716.

After Gasbarri once removed prostitution-related booths from the bar, petitioner instructed her to put them back and let the girls mingle with the customers or the Showbar would not survive. Throughout the period petitioner managed the Showbar, he and Gasbarri collected, and petitioner usually retained, the proceeds from the prostitution. In addition, petitioner prepared Showbar checks for Gasbarri's signature, recorded information on check stubs and deposit slips, helped her with payroll problems, participated in hiring and firing employees, recruited a bartender, chose a caretaker to run the enterprise during his trip with Gasbarri to a judicial seminar in Reno,[3] worked with Gasbarri whenever problems arose, dealt with the bar's accountant regularly, and counted the bar and prostitution proceeds. At petitioner's request, various dummy officers signed liquor license forms. In March 1979, petitioner told agents of the Wisconsin Alcohol and Tobacco Enforcement Division, who were conducting a routine inspection of the Showbar, that they would not get very far with any prosecution in the county, apparently because of petitioner's status as a Circuit Judge. *United States* v. *Raineri*, 670 F.2d at 716.

As part of its proof of the Travel Act violations, the government showed that a payroll check drawn August 12, 1978, on the Showbar's Michigan bank account and signed

---

N.W.2d 798 (Ct. App. 1980). Testimony at trial evidenced such conduct both before and after the statute's effective date of June 1, 1978. See *United States* v. *Raineri*, 670 F.2d at 716 n.10.

[3]On January 1, 1978, petitioner had become a Circuit Judge for Iron County, Wisconsin, within which the Showbar was located.

by Gasbarri was given in Hurley to a Showbar dancer and prostitute as compensation for her nude dancing, and that it crossed the state line in the process of collection. *United States* v. *Raineri*, 670 F.2d at 717. A September 12, 1978, check drawn on the same Michigan bank was used to pay the Lake Superior Power Company, a Wisconsin business, for power at the Showbar.[4] Petitioner had prepared this check for Gasbarri's signature, and the check crossed state lines as part of the regular clearance process. *Ibid.* Sheets and pillowcases were delivered from Hibbing, Minnesota, to the Showbar on October 2, 1978, and two prostitutes testified that they found sheets and pillowcases on the beds where they worked in the rooms above the bar. *Ibid.*

2. The court of appeals rejected all of the numerous issues petitioner raised on his direct appeal from his conviction. In particular, the court held that petitioner was not denied the effective assistance of counsel when his lawyer was unable to qualify Gasbarri's medical records for admission as an exhibit. *United States* v. *Raineri*, 670 F.2d at 710, 711-712. The court also rejected petitioner's claim that the evidence supporting the Travel Act charges was insufficient; it found that (1) petitioner reasonably foresaw the interstate travel or use of facilities in interstate commerce (*id.* at 716-717 n.12); (2) the acts were linked with petitioner (*id.* at 716-717); and (3) the interstate travel or use was significantly related to the illegal prostitution operation (*id.*

---

[4]Electricity was used to light the barroom and the upstairs rooms, to chill the champagne, and to provide musical accompaniment for the dancer/prostitutes. *United States* v. *Raineri*, 670 F.2d at 717.

at 717-718).[5] This Court declined to grant certiorari. 459 U.S. 1035 (1982).[6]

3. Petitioner filed a motion under 28 U.S.C. 2255 attacking his conviction on seven grounds: (1) ineffective assistance of counsel; (2) conflicting and misleading jury instructions; (3) erroneous findings of fact made by the district court; (4) admission of testimony regarding business records that were not produced; (5) denial of an effective right to confront a witness resulting from the district court's ruling that Gasbarri's medical records were privileged; (6) error resulting from the prosecution's having proceeded on two theories of liability; and (7) selective prosecution (Pet. App. A1-A2). The district court held that petitioner had raised the ineffective assistance of counsel and erroneous fact

---

[5]The court of appeals also upheld the district court's refusal to transfer venue of the trial (see *United States* v. *Raineri*, 521 F. Supp. 30, 32, 33 (W.D. Wis. 1980)). In addition, the court of appeals rejected petitioner's claims that the jury selection plan under which his jury was selected did not comply with the Jury Selection and Service Act of 1968, 28 U.S.C. 1861-1869; that he was denied a speedy trial under the Speedy Trial Act of 1974, 18 U.S.C. 3161-3174; that Counts IV and V were improperly joined for trial with Counts I through III and that the district court abused its discretion in failing to sever them; that the trial court had abused its discretion when it refused to interrupt trial to allow defense counsel to challenge whether Gasbarri's medical records were privileged because counsel had failed to do so prior to trial; that the prosecutor had no standing to move to quash a defense subpoena to recall Gasbarri as a defense witness and the district court's grant of the prosecution's motion violated petitioner's rights to confront the witnesses against him or to call witnesses in his own defense; that petitioner's statements to the grand jury were not material to its investigation; and that there was insufficient evidence that petitioner knew that Patricia Colossaco, the person he arranged to have threatened, would be a grand jury witness. *United States* v. *Raineri*, 670 F.2d at 705-719.

[6]In his petition, petitioner challenged only the court of appeals' disposition of his speedy trial, transfer of venue, and jury composition issues. See Pet. at i, cert. denied, 459 U.S. 1035 (1982).

finding claims on direct appeal and thus was estopped from litigating them again on collateral attack (*id.* at A2). The district court also concluded that the other contentions did not rise to the level required for relief under 28 U.S.C. 2255 (Pet. App. A2).

On appeal, petitioner regrouped his allegations to state three claims: (1) there was a fatal variance between the indictment and the proof at trial; (2) he was denied the effective assistance of trial counsel; and (3) there were fundamental errors in the jury instructions (Pet. App. A2). Petitioner also claimed that none of these issues had been resolved in his direct appeal (*ibid.*).

The court of appeals disagreed. The court concluded that petitioner's first argument was nothing more than an attack on the sufficiency of the evidence, a claim it had already rejected in *United States* v. *Raineri*, 670 F.2d at 715-718. Similarly, the court stated that the ineffective assistance of counsel claim had been addressed and rejected on direct appeal (*id.* at 711-712). Pet. App. A3. Finally, the court of appeals decided that, even if petitioner were correct in his assertion (*id.* at A2) that he had not raised his claims on direct appeal, he had waived those claims absent a showing of cause and prejudice as required by *Norris* v. *United States*, 687 F.2d 899, 903-904 (7th Cir. 1982). Accordingly, the court of appeals concluded that it was not required to consider petitioner's claims (Pet. App. A3).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

Petitioner does not attempt to explain why the court of appeals supposedly erred in refusing to reconsider issues it had already resolved on direct appeal and in refusing to

consider issues that petitioner had effectively waived by not raising them at the appropriate time and failing to make any showing of cause and prejudice for that waiver. Instead, petitioner merely reiterates the merits of some of the arguments he raised below. It is clear, however, that the court of appeals correctly disposed of petitioner's appeal on procedural grounds.

Two of the issues that petitioner asks this Court to review — the necessity under the Travel Act for proof of knowledge of interstate travel or use of a facility in interstate commerce and the sufficiency of the Travel Act evidence —were raised and rejected in petitioner's direct appeal. Moreover, neither issue was included in his petition for a writ of certiorari from the judgment affirming his conviction. See note 6, *supra*. Accordingly, these claims are not the proper subject of a motion to vacate sentence under 28 U.S.C. 2255. See, *e.g.*, *Norris* v. *United States*, 687 F.2d 899, 900 (7th Cir. 1982); *United States* v. *Shabazz*, 657 F.2d 189, 190 (8th Cir. 1981); *Chin* v. *United States*, 622 F.2d 1090, 1092 (2d Cir. 1980), cert. denied, 450 U.S. 923 (1981).

Similarly, there is no indication that petitioner raised the remaining two claims he presents to this Court — the sufficiency of the indictment and the allegedly erroneous jury instructions — in district court,[7] and he has utterly failed to show that his Section 2255 motion satisfied this Court's requirements under *United States* v. *Frady*, 456 U.S. 152 (1982). Under *Frady*, "to obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) 'cause' excusing his double procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains" (456

---

[7]Despite petitioner's unsupported assertion (Pet. 12) that he challenged the sufficiency of the indictment in his direct appeal, we have discovered nothing in his appellate brief on the direct appeal to support the claim.

U.S. at 167-168).[8] Thus, this case does not merit further consideration by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

GLORIA C. PHARES
Attorney

JANUARY 1985

---

[8]Petitioner's reliance on *Morris* v. *United States*, 503 F.2d 457, 458 (5th Cir. 1974), and *Brown* v. *United States*, 468 F.2d 897, 898 (5th Cir. 1972), to support his contention that this Court should consider his claims is misplaced. Both cases were decided before *Frady*, and they no longer offer petitioner any assistance.

DOJ-1985-01